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Nos. 374 and 375

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE TIMES-PICAYUNE PUBLISHING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, APPELLANT

v.

THE TIMES-PICAYUNE PUBLISHING COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

REPLY BRIEF FOR THE UNITED STATES

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I

The findings attacked by appellants are fully supported by the evidence

This Court has repeatedly held that it will not overturn findings of fact made by district courts in antitrust cases that are supported by sub-

stantial evidence and that are not "clearly erroneous." *United States* v. *Yellow Cab Company*, 338 U. S. 338; *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 495–496; *United States* v. *Oregon State Medical Society*, 343 U. S. 326. Appellants pay lip service to these decisions and avowedly attack only partial aspects of two of the district court's findings (Fdgs. 15, 31, R. 1255, 1259).[1] But appellants' contentions are inconsistent with the findings in a number of respects. All the findings in question are amply supported.

1. While appellants concede (Br. 36) that "[I]n a popular sense the morning Times-Picayune and the afternoon States may be referred to as two papers insofar as subscribers are concerned," they nevertheless repeatedly refer to the Times-Picayune and the States as separate editions of one newspaper (Br. 2, 10, 30, 34, 39, 40–42). They argue that the papers are one insofar as advertisers are concerned.

The findings make no such dichotomy. The district court found that the Times-Picayune and the States are "two separate and distinct newspapers" and that they "have been treated as separate newspapers by defendants" (Fdg. 12, R. 1255). The court did not accept the contention (not made in appellants' brief below but ad-

[1] See Appellants' Specification of Errors to be Urged (Br. 28–29).

vanced in oral argument (Tr. 74–79)) that what were two newspapers in a "popular sense" was only one newspaper for advertisers.

Appellants' contention is based upon the assumption that the fact that the Times-Picayune and States are separate and distinct newspapers is of no consequence to advertisers.[2] The evidence is all to the contrary.[3] Appellant corporation's Director of Advertising testified that "for selling purposes"—and he was talking about selling advertising—it was not erroneous to "say that there were two separate and distinct [newspaper] entities" (R. 129). Letters written by appellant corporation's Manager of General Advertising to general advertisers before the adoption of the unit rule urged upon them the differences between the two newspapers as a reason for advertising in both (see our main brief, 31–32). These letters were written before this case was instituted, and the district court properly relied upon them even if, which is highly doubtful, officers of appellant corporation gave contrary oral testimony at the

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[2] Appellants cite no evidence, either oral or documentary, in support of this assumption. See App. Br. 36–37, 42–44.

[3] Appellants also argue (Br. 36, 42–44) that the distinction between morning and afternoon newspaper advertising is an artificial one because appellant corporation is selling reader access to the advertiser without regard for the medium providing such access. Yet appellants, in soliciting advertising, have stated that afternoon newspaper advertising is a distinct field in the New Orleans newspaper market (Ex. G-31, R. 1328–35; Ex. G-43, R. 1351–2; Ex. G-44, R. 1353–4).

trial.[4] See *United States* v. *U. S. Gypsum Company*, 333 U. S. 364, 395–396. This is particularly true when appellants, although invited to do so, produced no supporting documentary evidence.[5]

2. Appellants also seek to undermine findings 22, 29, and 30 (R. 1257, 1258–9), which deal with the effects of the unit rule upon advertisers. They state (Br. 13–14, 18–20) that the number of advertisers called as witnesses by the Government is so small in proportion to the total number of advertisers as to be of no value. But although appellants had ample opportunity to call additional advertisers as witnesses to rebut the testimony of the Government witnesses, no such rebuttal witness was called.

Appellants assert (Br. 19) that "[N]one of the Government's witnesses indicated that there was

[4] Although the officers, who were interested witnesses, referred in their testimony to the Times-Picayune and the States as one paper, we do not understand that they testified that advertisers regarded the papers as one, contrary to the representations which they themselves had made to advertisers.

[5] Appellants admit (Br. 37) that "the actual facts * * * are undisputed" but say in a footnote (*id.* note 26) that "[T]here is conflicting evidence on the question of whether representatives of the Publishing Company have referred to the Times-Picayune and States as one or two newspapers." The fact is that during the trial appellant Times was asked to produce any statement written prior to this lawsuit in support of the contention that the States and Times-Picayune were merely editions of the same newspaper (R. 215–6). None was produced.

the slightest prejudice to their clients as the result" of adoption of the unit rule for general advertising. The Government's witnesses testified, and the court below found, that appellants' unit rule compelled advertisers involuntarily to purchase advertising in the States which they did not want, and to abandon or limit their use of the Item as an advertising medium contrary to their wishes (see our main brief 12–13, 16–19). We submit that the business of an advertiser is restrained when he is deprived of the opportunity to purchase the goods or services which he believes will best serve his needs. Appellants' argument that the advertiser is free to reallocate his advertising budget between appellant corporation and the Item is unrealistic in view of the findings and evidence as to the practical necessity of advertising in the Times-Picayune, and the limited amounts which advertisers are willing to allocate for advertising in New Orleans newspapers. See our main brief 8, 12–13, 16–19.

3. Appellants (Br. 58–61) seek to overturn the findings that the Item was injured by the combination rates (Fdgs. 21–22, 28–29, R. 1256–9). They point (Br. 13) to the increase in classified advertising in the Item from 1942 to 1950, which was nearly 150%, and assert that this is a fairer test period than the total period 1935 to 1950. In selecting the year 1942 (the Item's poorest year in the period 1933–1950 covered by the record, see Ex. G–106B, R. 1448), they failed to

inform the Court that in 1941 the Item was "sick and dying," "was going to disappear, go bankrupt" (R. 583), so that its stockholders in the middle of that year were induced by the International Paper Company (to whom it owed $100,000) to sell the paper (R. 577–586). The year 1942 was the first full year of operation by the new owner.

In any event, as the court found, in weighing the impact of the unit rule upon the competing newspaper, what is significant is not absolute increases in lineage, but the *relative* increase of the States over the Item. We do not understand that appellants contest the accuracy of finding 21 (R. 1256–7), that "[I]n 1934 the States carried 35% of the classified advertising lineage in the evening field. By 1950 it carried 68% of such lineage" (*ibid.*).[6]

4. Appellants state (Br. 12) that an "obvious and necessary effect" of the adoption of the unit rule for classified advertising was that the lineage in the States rose to a "par" with that of the

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[6] The actual figures for classified advertising appear in Exhibit G–106B (R. 1448). In part they are:

	Times-Picayune (morning)	States (evening)	Item (evening)
1934—Last year before forced combination rate	1,344,479	642,347	1,185,832
1935—First year under forced combination rate	1,490,316	1,344,849	1,180,850
1941	2,085,566	2,083,812	1,231,540
1942—Year appellants chose for comparison	1,954,870	1,957,057	910,275
1948	2,849,190	2,843,097	1,241,787
1949	4,277,302	4,420,193	2,232,617
1950	4,357,713	4,549,238	2,166,518

Times-Picayune. It is "obvious" that the lineage in the two papers would become equal; but it is neither "obvious" nor "necessary" that the lineage in the States would rise to the prior level of the Times-Picayune.[7] Normally it would be expected that fewer persons would buy A and B in forced combination than would buy the two products separately. If there were practical alternatives, some customers would not bow to the compulsion. It thus seems clear that when the Times-Picayune lost no lineage following adoption of the forced combination rate and the States lineage rose to equal that of the morning paper, this occurred only because of the dominant position of the Times-Picayune. As the district court found (Fdg. 31, R. 1259):

> The Times-Picayune Publishing Company is able to enforce the unit rate only because of the dominant position which the Times-Picayune, the tying product, occupies in New Orleans and the New Orleans trading area.

Had it not been that advertisers in New Orleans felt it necessary to use the Times-Picayune, the forced combination rate would have resulted in a

[7] As shown in the table in the preceding footnote, in 1934, the last year before the adoption of the unit rate on classified advertising, the lineage in the Times-Picayune was (in round figures) 1,344,000 lines and that in the States 642,000 lines. In 1935, the first year of the unit rate, the classified lineage in the States was 1,344,000 lines, the same as that in the Times-Picayune for the preceding year.

decline in its lineage, for some Times-Picayune advertisers did not wish to advertise in the States (our main brief 12–13). As Mr. Justice Frankfurter pointed out in *Standard Oil Co.* v. *United States*, 337 U. S. 293, 305–306 (quoted in our main brief 36–37), only the seller's market control over the tying device gives him the power to induce buyers to enter into tying contracts.

5. In estimating the effect of the unit rate on general advertising in the Item, appellants assert (Br. 84) that during the first year their unit rule was in effect the Item increased its general lineage by 682,458 lines. In a footnote (Br. 84, note 47) they explain that they obtained this figure by adding to the Item's daily lineage in 1950 all the general advertising published in its Sunday paper. The inclusion of Sunday advertising also explains appellants' assertion (Br. 84) that the Item's proportion of all general advertisements in New Orleans increased from 23.36% in 1949 to 26.43% in 1950.[8] The Item did not begin to publish a Sunday paper until March, 1950 (Exhibit D–16, R. 1641). The grouping of Sunday advertising lineage with daily lineage disregards the very real distinctions between the daily and Sunday newspaper field. The rate structure for newspaper advertising separates

[8] Appellants have added the Sunday figures in Exhibit D–16 (R. 1641) to the weekday figures contained in Exhibit G–108B (R. 1452).

Sunday from daily advertising.[9] Appellants' letters and lineage analyses refer to "the New Orleans Sunday newspaper field."[10] In computing volume of circulation, the number of copies sold on Sundays is separated from those sold on weekdays.[11]

The comparative lineage of general advertising of the States and the Item daily (excluding Sunday) for 1949 and 1950 appears in the following table (computed from Ex. G–107B, R. 1450) giving the lineage of each paper for the first 11 months of each year. (In the court below defendants objected to comparing the figures for the entire year, on the ground that in December 1950 the Item reduced its number of daily issue editions from six to five (R. 533–5)).

	States	*Item*
1949	1, 791, 152	1, 704, 713
1950	2, 354, 001	1, 705, 313

These figures show that the States' lineage increased over 30% after the adoption of the forced combination rate while the Item's lineage showed a slight gain, as the court found (Fdg. 28, R.

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[9] See Exs. G–19 to G–29, R. 1307–26; Ex. G–34, R. 1340; Ex. G–45, R. 1355–7; Ex. G–51, R. 1367–8; Ex. G–80 (not printed); Ex. G–86 (not printed); Exs. G–88 to G–92 (not printed); Ex. G–104, R. 1443–4; Ex. G–105, R. 1445–6.

[10] See Ex. G–47, R. 1361–2; Ex. G–41, R. 1348–9; Ex. G–32, R. 1336–8; Ex. G–48, R. 1363–4; Ex. G–70, R. 1388–90; Ex. G–103, R. 1429–42.

[11] Ex. G–146, R. 1494–1520; Ex. G–155, R. 1575–1604; see also Ex. G–15, R. 1298–1300; Ex. G–17, R. 1303–04; Ex. G–33, R. 1339; Ex. G–93, R. 1410–11.

1258). The Item's gain is still less than 1% if the figures are adjusted to include automobile and financial advertising, as suggested by defendants in the court below.[12] Within one year after the adoption of the unit rate on general advertising, the Item's share of the general advertising carried in afternoon New Orleans newspapers dropped from 49% to 42% while that of the States conversely increased from 51% to 58%.

In any event, the district court heard appellants' arguments on this point and rejected them in finding 28 (R. 1258). It found that "the States secured a commanding lead over the Item in the general display field after it had the advantage of the unit rate, and not until then" (*ibid.*). Its opinion states (R. 1242):

> It is impossible, of course, to state with any degree of precision what portion of the increased lineage enjoyed by the States would have gone to the Item but for the forced unit rate. However, it is clear that some general advertisers bought space in the

[12] Defendants urged (R. 531) that the lineage for the Item, as set forth in Exhibit G-107B (R. 1450), should have included automotive and financial advertising. The additional lineage for the Item, as shown by Exhibit G-125 (R. 1475), in 1949 would be 432,862 and in 1950, 449,922. This would mean that the total figures for the Item would be 2,137,575 for 1949 and 2,155,235 for 1950. (Although a similar adjustment should be made for the States, the necessary figures do not appear in the record.) The net result is that the Item would show a gain of 18,000 lines in 1950, which still amounts to less than 1% of its total adjusted lineage.

States which they would not have purchased in either afternoon paper, while others bought space in the States which they would have purchased in the Item absent the forced unit rate.

6. We believe that our main brief (20–22, 49–50) sufficiently answers the attack upon the court's finding that it was appellants' intention, in adopting the unit rule for general and classified advertising, "to substantially diminish the competitive vigor of the Item" (Fdg. 31, R. 1259). *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341–342, held that findings on intent and motive which are supported by evidence and are not "clearly erroneous" will not be set aside on appeal.

II

The decisions do not support appellants' contentions as to the legality of their tying contracts

Appellants, in urging that their tying contracts are not in unreasonable restraint of trade, rely (Br. 62–66) upon three cases—*Prairie Farmer Pub. Co.* v. *Indiana Farmer's Guide Pub. Co.*, 88 F. 2d 979 (C. A. 7), certiorari denied, 301 U. S. 696; *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; and *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463.

In the *Prairie Farmers* case, the defendants were five companies engaged in publishing seven

state or sectional farm magazines [13] and a company acting as their agent in soliciting advertising. The charge which the agent quoted for advertising carried in all seven papers was lower than the sum of the separate charges for advertising in any six of the papers. In a triple damage suit brought under Section 7 of the Sherman Act by the publisher of an Indiana farm magazine, the court of appeals held that the defendants did not illegally restrain trade when they offered an optional combination rate which permitted defendants' papers (circulating primarily in particular states) to compete more effectively for advertising with farm papers having national circulation. The decision did not involve tying contracts or forced combination rates, nor did the court refer even obliquely to the issue presented he e—use of monopoly power as a trade weapon against competitors in a field in which the monopolist encounters competition.

The *Cratz* case (253 U. S. 421) merely held that the Federal Trade Commission's complaint failed to allege facts showing use of "unfair" methods of competition. The charge made in the complaint was simply that the respondents, distributors of steel ties for binding bales of cotton and of bagging for wrapping such bales, refused to sell ties apart from corresponding amounts of

[13] They published magazines in Illinois, Iowa, Nebraska, Minnesota, and Wisconsin, an "Indiana edition" of the Illinois paper, and a "Dakota edition" of the Minnesota paper.

bagging. There was no allegation as to the part of the trade in ties or bagging controlled by the respondents, and no allegation that they had "ability, purpose or intent" to acquire a monopoly of either product (see 253 U. S. at p. 428). Unlike the instant case, no monopoly control of the tying product was alleged.

Appellants assert (Br. 64) that the respondents in the *Gratz* case "had at least a dominant position if not a virtual monopoly in the sale of steel ties in the area." Although this may have been shown by the evidence (see dissenting opinion of Mr. Justice Brandeis, p. 440), the Court's decision was based solely upon the sufficiency of the complaint issued by the Commission. The Court found it "unnecessary now to discuss conflicting views concerning * * * effect of the evidence presented." 253 U. S. at 426. Indeed, one of the bases for Mr. Justice Brandeis' dissent was his opposition to decision of the case on a pleadings basis rather than on the basis of the legality of the respondents' conduct in the light of the evidence and the Commission's findings. 253 U. S. at 429–430.

The *Sinclair* case (261 U. S. 463) held that it was not an unfair method of competition for companies engaged in selling gasoline to retail gasoline stations to lease gasoline pumps to the dealers for a nominal rental, on the understanding that the dealer use only the seller's gasoline in pumps so leased. The decision rests on the

existence of "many competing concerns" which dispose of pumps in the same way and the availability of gasoline from "many competitors," the ease with which the retailer can obtain pumps from other sources, and the absence of monopoly power or any effect upon competition. 261 U. S. at 474–475. The only pertinence of the case here is the implication that if competition were affected, as it is in the instant case, the result would have been different.

Appellants discuss at length (Br. 66–75) decisions upon which the Government relies to show the illegality of appellants' tying contracts. We believe that our main brief sufficiently meets most of the points which appellants raise, and will reply only to their contention (Br. 72–73) that *United States* v. *Griffith*, 334 U. S. 100, was a proceeding against affiliated corporations and that the decision is therefore not applicable to tying contracts made by "a single trader." We quoted in our main brief (p. 45) the Court's explicit statement that use of monopoly power to procure advantages over others in competitive situations violates the Sherman Act whether this is done by a single corporation or by two or more. This statement lies at the very heart of the Court's decision and clearly is not casual *obiter dictum*.

The question before the Court in that case was whether a "necessary and direct result" of the master agreements was illegal restraint or mo-

nopolization of trade (334 U. S. at p. 106). The Court concluded that when films are bargained for on the basis of linking together a circuit's closed and competitive towns, so that the monopoly position in certain towns is employed to obtain advantages over competitors in other towns, this is a misuse of monopoly power forbidden by the Sherman Act (*id.*, p. 109). Thus, common action by two or more defendant corporations was not an element determinative of illegality. Indeed, each entered into separate master agreements with distributors, and, with minor exceptions, the theatres which each owned did not compete with those of its affiliates (*id.*, p. 102). Accordingly, each defendant's master agreements affected different competitors, and operated to restrain and monopolize trade independently of any like agreements by other corporate defendants.

Appellants suggest that the authorities relied on by the Government are distinguishable because the tying contracts here are not "exclusive" since they do not in terms forbid advertisers to patronize the Item. The same was true of the tying involved in the block-booking of motion pictures in *United States* v. *Paramount Pictures*, 334 U. S. 131, 156–159. Although purchasers there were required to buy one feature film in order to get another, the contracts were not exclusive. Ex-

hibitors were free to deal with other motion picture producers and vice versa. Appellants seek to distinguish the *Paramount* case on the ground that movies are copyrighted. As we point out in our main brief (pp. 45–46), the fact that the Times-Picayune's monopoly in the morning field is not protected by a copyright does not give to their tying contracts additional immunity or validity. When one of the tied products gives monopoly power, the tie is unlawful irrespective of whether the other product is monopolized.[13] Cf. *International Salt Co.* v. *United States*, 332 U. S. 392.

The "exclusive privileges" which were accorded defendant exhibitors in the *Griffith* case consisted of the right to the first-run of each picture. Here appellants have, by virtue of tying contracts, the equivalent of the first-run on the evening paper advertising dollars of those advertisers who feel compelled to advertise in the Times-Picayune. The Item, like the independent exhibitors, can get only what is left. Clearly the tying contracts have an excluding effect for the substantial portion of the advertisers (Ex. G–109B, R. 1454) who wish to advertise in the morning paper and a single evening newspaper or who are precluded by budgetary limitations from advertising in all three New Orleans newspapers (our main brief, 13, 18–19).

[13] Block-booking would have been no more lawful if exhibitors had been permitted to obtain copyrighted pictures only on condition that they also purchase uncopyrighted ones.

In the *International Salt* case the tying provisions in leases of the "Lixator" machines did not forbid all purchases from competitors (332 U. S. 392, at pp. 396–397). Such purchases were permitted if competitors offered salt of equal grade at a price below that of the International Salt Company. This Court, in holding that such permission did not free the contracts from the taint of illegality, said (p. 397):

> The "Lixator" provision does, of course, afford a measure of protection to the lessee, but it does not avoid the stifling effect of the agreement on competition. The appellant had at all times a *priority on the business* at equal prices. [Italics supplied.]

In the present case appellants have a "priority" on the evening newspaper business of all those advertisers who feel it essential to advertise in the Times-Picayune.

III

The Government's proposed substitute for paragraph V–C of the judgment should be approved

Both appellants and the Government are opposed to paragraph V–C of the present judgment. Consideration of the various objections to this paragraph would seem to establish the need for modifying it.

Appellants urge (Br. 97), just as we do (main brief 62), that the "dominant position" clause in paragraph V–C is uncertain in its meaning and

effect. Appellants also contend (Br. 93–94) that the evidence does not warrant regulating the separate rates of appellants' two papers, and the Government does not request regulation of separate rates as such. Appellants urge (Br. 94–95) that the provision against selling below cost would prevent them from selling advertising if economic conditions were such that their entire operations were conducted at a loss—an interpretation of the judgment which we think highly doubtful since paragraph V–C bars only sales resulting from use of the Times-Picayune's "dominant position." Appellants' other objections to this paragraph (Br. 95–98) are that the clause dealing with advertising rates lower than the "cost" of producing and selling advertising is "unworkable" in view of the complexities of cost accounting in the newspaper publishing business; the ambiguity of the clause prohibiting rates lower than "comparable" newspaper advertising rates in New Orleans; and the impracticability and undesirability of what appellants term an "attempt to regulate newspaper advertising rates by judicial fiat."

None of the foregoing objections applies to the substitute for paragraph V–C proposed by the Government—that appellant corporation be barred from fixing advertising rates for one of its papers which are dependent upon an advertiser's use of its other paper, except to the extent of the cost saving which can be shown to result

from the advertiser's use of both papers. We submit that such a prohibition is reasonably definite and specific. It would involve no question of "comparable" New Orleans newspaper advertising rates, no question of the "cost" of producing and selling particular categories of advertising, no prohibition tied to a showing of use of the Times-Picayune's "dominant position," no regulation of *separate* rates, and no permanent prohibition of combined or joint rates which are economically warranted.

The prohibitions sought by the Government in lieu of paragraph V–C are primarily aimed at preventing combination rates which are optional in form but coercive in effect, and which would permit evasion of the basic prohibition of forced combination rates. Appellants rather weakly oppose such a prohibition (Br. 105) upon the ground that any such evasion could be dealt with after the event—by application to the court by the Government for expansion of the judgment's prohibitions. The two cases cited by appellants do not support their contention.

International Salt Co. v. *United States*, 332 U. S. 392, upheld a prohibition which went beyond the "specific illegal practices" in which the defendants had engaged. The Court (p. 401) rejected defendant's contention that in some hypothetical situation the judgment might prove too drastic, and said that if that situation arose it was open to the *defendants* to apply to the

district court for appropriate modification of the judgment. In *Associated Press, Inc.* v. *United States,* 326 U. S. 1, 22–23, this Court declined to grant broader prohibitions than those which the district court had found to be adequate, partly upon the ground that the fashioning of a decree in an antitrust case rests largely in the discretion of the trial court and partly upon the ground that under the Government's motion for summary judgment the factual issues had been narrowly presented and determined. In contrast, the district court in the instant case, after a full trial, recognized the need for a prohibition designed to prevent evasion of the judgment's basic prohibitions (see our main brief 57–59). In substance, what we propose is a revamping of the supplementary prohibition which the district court adjudged necessary.

Appellants contend (Br. 104) that the exception proposed by the Government—that appellants may fix lower combination rates to the extent of the saving in expense resulting from running the same advertisement in two newspapers rather than one—involves all the difficulties inherent in cost accounting in the newspaper business. We submit that showing such saving is altogether different from showing the "cost" of producing and selling particular categories of advertising. Proving such savings does not require a complete cost analysis of all aspects

of a newspaper's operations. Appellant corporation must know the departments of its business in which there would be actual savings and the steps which would be omitted if the same advertisement is used in both papers. In the departments in which there would be savings, it would not be necessary to ascertain all of their costs but only those costs which would be eliminated if the same advertisement appears in both papers. Mathematical exactitude in this matter is, of course, not required.

Appellants contend (Br. 103) that the Government's proposal for a three-year prohibition of combined rates lower than the newspapers' separate rates is punitive, not remedial. Our main brief (66–67) undertakes to show that the purpose of the three-year limitation is remedial.

Respectfully submitted.

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